IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.757 OF 2006

Baba Piraji Shinde & Ors. ...Appellants

V/s.

Jotiram Hindurao Shinde and Ors. ...Respondents

Mr.Ashutosh Gole Appellants.
Mr.Y.A. Sakhare i/b. M/s.YKS Legal for Respondent No.1, 2, 4 and 5.

CORAM : V.M. KANADE, J.

DATED : 23rd AUGUST, 2007.

P.C:-

1. Heard learned counsel for the Appellants and learned counsel for the Respondent Nos.1, 2, 4 and 5.

2. Appellants are the Original Defendant Nos.1 and 5 to 9 and Respondent No.1 to 4 are the Original Plaintiffs. A suit was filed by the Plaintiffs for partition and for declaration that the portion of a certain land is a self-acquired property. The Trial Court decreed the suit. The Defendants preferred an appeal against the said Judgment and Decree. The appeal was party allowed. However, the lower Appellate Court set aside the finding recorded by the Trial Court in respect of plea raised by the Plaintiffs

that the certain portion of the land was their self-acquired property. Appellants herein in their written statement had taken a specific plea that there was partition on the suit land and that it had taken place about six years prior to filing of the suit and the shares of coparceners have been defined. Entries were made in the 7/12 extracts. It was further submitted that the party had accepted their shares and they were residing separately and cultivating their land separately and that the Defendants had sold certain land which was given to them in the partition. It was submitted that all these circumstances clearly showed that there was already partition between the parties.

3. Learned counsel for the Appellants submitted that the Trial Court and the lower Appellate Court had erred in relying on 7/12 extracts which had defined shares of coparceners. He submitted that the coparceners were admittedly staying separately. He submitted that both the courts below had erred in ignoring the entry made in the 7/12 extracts and circumstance such as sale deed was executed by the Defendants in favour of third party. He further submitted that both the Courts below had erred in holding sale deed was illegal and void and not binding on the Plaintiffs. He submitted that the suit was filed for a specific relief of partition and that no

separate relief or declaration in respect of the sale deed was claimed by the Plaintiffs, then it was not open for the Trial Court or the lower Appellate Court in declaring sale deed illegal and void.

4. Learned counsel for the Respondents, on the other hand, submitted that concurrent finding of fact was recorded by both the Courts below and that merely entry in the 7/12 extracts does not prove that there is partition between the coparceners. In my view, submissions made by the learned counsel for Appellants cannot be accepted. It is a well settled position in law that merely because shares of coparceners are defined in the 7/12 extracts that by itself does not prove partition between coparceners. For proving partition, either the parties have to show that it was a registered partition deed or parties claiming the partition have to adduce oral and documentary evidence to show that there was actual partition by metes and bounds.

5. In the present case, the Appellants relied on the extracts of 7/12 entries in which shares have been defined. Both the Courts below have rightly held that this fact does not prove the partition by metes and bounds between the parties. Submission of learned counsel for the Appellants is

not accepted. However, there is some substance in the submission made by the Appellants that both the Courts below erred in declaring the sale deed executed by the Defendants in favour of the third party is illegal and void. Since no relief was claimed by the Plaintiffs in their suit, it is not open for the lower Courts to give a declaration that the sale deed is illegal and void. Finding recorded by the lower Courts in respect of sale deed, therefore, to that extent, is set aside. Second Appeal is accordingly, dismissed in the above terms.

6. In view of dismissal of Second Appeal, Civil Application does not survive and is disposed of accordingly. It is clarified that while effecting partition by metes and bounds, the Tahsildar shall submit his report after taking into consideration the lands which are sold by the parties and shall accordingly determine the shares.

V.M. KANADE, J.